UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF ENERGY

Interstate Electric Transmission System;
Electric Reliability Issues
Notice of Inquiry

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES' COMMENTS ON ELECTRIC RELIABILITY ISSUES NOTICE OF INQUIRY

The National Association of State Utility Consumer Advocates ('NASUCA') hereby submits the following comments in response to the Department of Energy's Notice of Inquiry relating to Electric Reliability Issues for Interstate Electric Transmission Systems. *Interstate Electric Transmission System; Electric Reliability Issues; Notice of Inquiry,* 65 Fed. Reg. 69753 (November 20, 2000). The Department of Energy (DOE), by this Notice of Inquiry (NOI), seeks comment on whether it should initiate a rulemaking proceeding for final action to the Federal Energy Regulatory Commission (the Commission) in which the FERC would adopt and impose mandatory electric reliability standards. DOE intends by this action to promote and ensure the long-term reliability of the interstate electric transmission system. In particular, DOE seeks comment on the need for federal reliability regulations and existing federal authority to impose mandatory reliability standards. DOE also seeks inquiry into the relationship between a) proposed legislation on electric reliability issues and potential regulations; b) between Regional Transmission Organizations (RTOs) and regional reliability councils; c) between federal and state authorities with respect to electric reliability issues; and d) between national and international electric reliability concerns. DOE has also opened the door to additional comments relating to electric reliability issues.

NASUCA strongly supports proposed federal reliability legislation such as that which

passed the Senate last year in Senate Bill No. 2071. Nevertheless, NASUCA recognizes that the prospect for passage of such legislation is questionable at this time. If such legislation is not immediately forthcoming, NASUCA would encourage DOE and FERC to initiate a rulemaking to adopt enforceable, basic electric reliability standards and regulations.

NASUCA is an organization comprised of offices from 39 states and the District of Columbia, charged by their respective state laws to represent utility consumers before federal and state utility regulatory commissions, before other federal and state agencies and before federal and state courts. Each NASUCA member has extensive experience with regulatory policies governing the electric utility industry and has actively participated in the recent debates concerning restructuring of the industry and proposed federal electricity reliability legislation. NASUCA's primary interest is the protection of residential and small commercial consumers. The reliability of the nation's electric system is one of our paramount concerns.

NASUCA believes that the events of the past few years justify adoption of national and enforceable electric reliability standards. For many years, the national focus on utility systems has been toward increasing interconnectedness for purposes of increasing transmission level stability. With this accomplished however, the recent dramatic increase in wholesale transactions (coupled with increases in electric demand unmatched by similar increases in generation) has produced conditions that have led to acute instabilities in the interconnected transmission grid, with concomitant increases in transmission unreliability events. NASUCA believes that the increasing frequency of transactions, increasing demand/supply imbalances, and fluctuating regional transmission grid configurations may lead to further increases in such unreliability events, even if market conditions are expected to stabilize in the long term. As noted above, while efforts have been underway for some time to pass federal legislation mandating the development of enforceable electric reliability regulations, such efforts have yet to yield actual legislation. NASUCA submits that FERC should exercise the authority it currently

has to promulgate and enforce national reliability regulations. While NAUSCA urges DOE to move forward with a rulemaking in this matter, NASUCA would also urge all parties to continue to work diligently to get federal legislation passed to clarify and amplify the Commission's authority over electric reliability.

1. Evidence Of Reliability Problems That Enforceable Regulations Could Mitigate

On December 21, 2000, the North American Electric Reliability Council (NERC) issued a press release noting that the year 2000 witnessed a 90% compliance rate with NERC and regional reliability council reliability policies and standards. This means that at least some utilities are not complying with the voluntary reliability standards established by NERC and the regional councils. NASUCA submits that anything less than 100% compliance with these critical rules poses a threat to the reliability of the electric grid.

In recent years, the nation has experienced at least two major events giving rise to concerns over the reliability of the nation's electric systems. One mid-western utility's failure, during the summer of 1999, to follow the voluntary reliability rules established by the regional reliability council in which it participated demonstrates the need for federal enforcement authority over compliance with transmission reliability standards. The problems in California this past year, while sourced in several complex factors, likewise demonstrate the need for greater federal authority over both transmission and generation reliability.

a) Reliability Problems In The Mid-West In 1999

According to reports published at the time in national newspapers and the trade press, during July, 1999, Cinergy, one of the large electric utilities serving mid-western markets, under-scheduled power during peak periods on several days, and instead 'borrowed' 9,600 MWs of electricity from the regional grid. Rebecca Smith and John J. Fialka, *Juice Squeeze, Electricity*

Firms Play Many Power Games That Jolt Consumers, Wall St. J., Aug. 4, 2000, at A1; *New Revelations About Cinergy's July Actions Prompt Condemnation,* Electric Utility Week (The McGraw-Hill Companies), Nov. 29, 1999, at 1. By under-scheduling during peak hours, this utility allegedly received thousands of megawatt hours of power during a period of time when price spikes existed in the mid-western markets. Consequently, the Company ran a negative imbalance on the system. The Company later returned this imbalance during periods when the demand was lower and prices had moderated to significantly lower levels. This utility's actions apparently violated NERC's reliability policies, as well as the reliability standards adopted by the regional reliability council in which the Company participates, the East Central Area Reliability Coordination Agreement Council (ECAR). Those standards require a control area operator experiencing substantial problems meeting its load to promptly balance generation and load by buying power in the market, or by shedding load, in order to avoid prolonged leaning on the grid. In essence, the Company's actions during July, 1999 resulted in lowering the frequency levels in the Eastern Interconnections significantly below the standard, thus posing a substantial threat to the reliability of the regional grid. *Id.*

By under-scheduling power flows, Cinergy was able to avoid summer price spikes in the mid-west. However the cost imposed on other users as a result of the Company's non-compliance with NERC's and ECAR's reliability standards was a significant threat to regional system reliability. Since the NERC's and ECAR's standards depend on good will and peer pressure for compliance, no financial remedy existed at that time to sanction this utility's behavior. The existence of enforceable reliability regulations, complete with financial penalties, may have avoided the threat to regional reliability experienced in the mid-west during the summer of 1999.

b) Reliability Problems In California In 2000

In California and the western markets, the Commission's Staff found that competitive market problems, such as scarcity of supply, market design flaws and the possible exercise of market power, were all factors in the high prices experienced this past summer. Part I of the Staff Report to the Federal Energy Regulatory Commission on Western Markets and the Causes of the Summer 2000 Price Abnormalities, at 5-1, November 1, 2000 (Staff Report). The California ISO has also reported that there has been evidence of significant under-scheduling of supply by power producers, and underestimating of demand by utilities. Presentation by Kellan Fluckiger, California ISO, October 24, 2000.

Amongst other findings, the FERC Staff found that "An increase in unplanned outages shortly before or during price spikes would be an indicator of physical withholding. As noted in Section 2.3, the amount of capacity due to unplanned outages was 2787 MW greater in August 2000 than it had been in August 1999." Staff Report at 5-20. The report's authors conclude that changes in market rules are required to address these market flaws. Staff Report at 5-23. The existence of enforceable, federal reliability guidelines may have assisted in averting at least some of these problems.

2. Existing Federal Authority To Enact Reliability Regulations

NASUCA submits that FERC has broad authority under existing statute to address reliability issues for the nation's electric transmission system. From its first article, the Federal Power Act clearly establishes the scope and importance of the powers provided to FERC, "declar[ing] that the business of transmitting and selling electricity for ultimate distribution to the public is affected with a public interest, and that Federal regulation . . . is necessary to the public interest . . . ". FPA § 201 (a); 16 U.S.C. § 824 (a). FERC therefore has "jurisdiction over all

facilities for such transmission or sale of electric energy . . . " FPA § 201 (b)(1); 16 U.S.C. § 824 (b)(1). In furtherance of the statutory responsibility for the facilities placed within FERC's jurisdiction, the FPA grants FERC "the power to perform any and all acts, and to prescribe, issue, make, amend and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of the Act." FPA § 309; 16 U.S.C. § 825h. NASUCA interprets this wide declaration of authority to provide for transmission reliability-related oversight and authority to act to maintain reliable electric power, a service which is vital to the public interest.

Aside from these general grants of power, the FPA also contains specific authorizations to deal with particular issues. FERC has broad powers under Section 210 of the FPA to require "such action as may be necessary to make effective physical connection[s] . . . which are ineffective for any reason, such as inadequate size, poor maintenance, or physical unreliability," "such sale or exchange of electric energy or other coordination, as may be necessary" for the integrity of physical connections, and "such increase in transmission capacity as may be necessary . . . " FPA § 210; 16 U.S.C. § 824i. While other parts of the Federal Power Act anticipate FERC action in response to requests from state commission or industry participants,[1] subsection (d) of Section 210 specifically

[1] Several sections of the FPA provide that state commissions and industry participants may apply to FERC for redress of particular issues, several of which are reliability-related. See FPA § 207, 16 U.S.C. § 824f (upon complaint of state commission, FERC may act on any inadequate or insufficient interstate service of any public utility by means of order, rule or regulation); FPA § 210, 16 U.S.C. § 824i (upon application of any electric utility, geothermal power producer, federal power marketing agency, qualifying cogenerator or qualifying small power producer, FERC may require the full range of Section 210 remedies referenced above); FPA § 211, 16 U.S.C. § 824j (any electric utility, federal power marketing agency or any generator selling in wholesale markets may apply to FERC for an order requiring a transmitting utility to provide transmission services including enlargement of transmission capacity, subject to the provisions of Section 212 relating to rates and the condition that reliability of the affected electric systems not be impaired, and subject to a regulatory "out" clause owing to the lack of eminent domain rights). While these sections provide additional means by which matters may be brought before FERC, they do not limit the broad powers granted FERC to address reliability issues sua sponte. On the contrary, they firmly reemphasize FERC's broad power to deal with issues relating to the adequacy of electric service.

provides that FERC may take such action "on its own motion."

The FERC's authority is not completely unlimited under subsection (d), but is subject to the cost recovery limitations of Section 212 and the public policy concerns listed in subsection (c) of Section 210. Thus, Section 210 requires FERC to consider whether its actions would be "in the public interest," and would either "encourage overall conservation of energy or capital," or "optimize the efficiency of use of facilities and resources," or "improve the *reliability* of any electrical utility system or Federal power marketing agency to which the order applies." FPA § 210 (c); 16 U.S.C. § 824i (c)(emphasis added). "Reliability" is the very issue at stake, and the above-quoted subsections clearly provide a basis for broad FERC action under Section 210. Of course, FERC must comply with the notice requirements of subsection (b) of Section 210 as well as the deference due to matters within state jurisdiction, but the plain terms of Section 210 do not otherwise limit FERC from generic rulemaking proceedings.

Reliability is an essential element of the public interest in electric power, and Sections 205 and 206 of the Federal Power Act also provide relevant authority for FERC to ensure that reliability. Section 205 requires that '[n]o public utility shall, with respect to any transmission or sale . . . (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.' FPA § 205 (b); 16 U.S.C. § 824d (b). Further, Section 206 provides that where 'any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter be observed and in force, and shall fix the same by order.' FPA § 206 (a); 16 U.S.C. § 824c (a). Such action may be undertaken after hearing either upon complaint or by the FERC's own motion. Id.

Although these provisions relate to rates, they also clearly relate to rules, regulations, and

practices in the industry. As daily news stories from California and elsewhere all too plainly indicate, reliability is critically related to pricing issues, and it is clear that some market participants can make huge profits when reliability suffers. NASUCA submits that the FERC has the responsibility under Sections 205 and 206 to consider reliability impacts on market conditions and the likely consequence that reliability problems will lead to unjust and unreasonable 'or worse' rates. Based on the authority provided by the Federal Power Act ' and in the absence of Congressional action ' NASUCA submits that FERC can and should institute generic rulemaking proceedings for the establishment and enforcement of reliability standards.

3. Federal Reliability Regulations Could Enhance The Reliability Of Wholesale Markets

FERC has statutory responsibility and authority to establish and enforce reliability standards, stemming from its charge to protect the public interest in matters pertaining to transmission of electric energy (FPA § 201; 16 U.S.C. § 824) and the power to act on that charge by such means as it finds necessary or appropriate (FPA § 309; 16 U.S.C.§ 825h). NASUCA further observes that the delegation of certain authority to self-regulating reliability organizations (and indeed, those organizations' *establishment*) is anticipated in existing statute. FPA § 202 (a); 16 U.S.C. § 824a.

Understanding the phrase 'reliability standard' to include both static parameters (such as the geographical/territorial) and dynamic parameters (having to do with system operations), FERC may delegate the authority to self-regulating reliability organizations via how FERC defines regional districts and carries out its affirmative duty 'to promote and encourage such interconnection and coordination . . .§FPA ' 202 (a); 16 U.S.C. § 824a(a). To address the need for dynamic standards, FERC may prescribe contingency standards and annual reports to assure continuity of service, and may require those reports be submitted to FERC or any appropriate State regulatory authorities.

FPA § 202 (g); 16 U.S.C. § 824a(g).

FERC may choose to delegate such powers where it finds in the public interest to do so, but NASUCA strongly urges that such delegation should only take place following a generic rulemaking clearly setting the parameters of such delegation, and only if the delegation makes clear FERC's authority to command by proxy. Consistent with the FPA's public interest requirements, FERC must always retain ultimate authority ' just as it retains ultimate responsibility.

4. Interaction Of Federal Reliability Legislation and Potential Federal Reliability Regulations

With respect to federal legislation, NASUCA supported S. 2071, passed by the U.S. Senate in the last Congress. We believe that passage of this legislation will address this issue. NASUCA strongly supports adoption of reliability legislation as either a stand alone, or as part of a comprehensive electric restructuring bill. NASUCA also supported many of the provisions of the Comprehensive Electricity Competition Act (CECA) proposed by the Administration, including its provisions on electric reliability. These bills would give the FERC the authority to oversee a national regional reliability organization that would provide standards for regional reliability organizations. These regional organizations would be under the regulation of the FERC. Short of this, the FERC should propose all rules that fall within their existing authority. Our answers to questions 2 and 3 of this Notice of Inquiry form the basis for the type of issues that currently fall within the purview of the FERC. In addition, the Department of Energy can ask the FERC and its Office of General Counsel to identify which provisions fall under the FERC's existing authority under the Federal Power Act. These provisions should be included as the basis for a rulemaking.

5. Relationship Between Regional Transmission Organizations ('RTOs') and Regional Reliability Councils

Once the Commission or DOE establishes federal reliability standards, the question becomes one of the ability of some entity to enforce compliance with such standards. The regional reliability councils have established reliability standards. However, as noted above, at the current time compliance with those standards is voluntary and generally no financial sanctions exist for non-compliance. One means of encouraging compliance is the establishment of a working relationship between the regional reliability councils and Independent System Operators ('ISOs') or RTOs. ISOs and RTOs are regulated utilities at the federal level. The Commission could establish federal reliability guidelines and require all RTOs to develop rules requiring compliance with such guidelines or with the reliability standards adopted by the regional reliability councils.

Currently, Order No. 2000, in Characteristic 4, requires that RTOs exercise control over the short-term reliability of the grid. *Regional Transmission Organizations*, III FERC Stats. & Regs., Regulations Preambles, §31,089 at 31,103 (2000) (hereinafter Order No. 2000). The Commission noted that this included redispatch for reliability authority, confirmation and implementation of interchange schedules, transmission outage scheduling approval authority, and everything short of grid capacity enhancements. *Id.* at 31,103. The Commission determined, however, that while it would require generators to give notice of planned outages to the RTO, the RTO would not have generation outage approval authority. *Id.* at 31,104-106. Nor did the Commission require RTOs to establish performance or ratings standards. *Id.*

Function 7 requirements in Order No. 2000 provide RTOs some additional authority over longer-term reliability of the grid. Function 7 requires RTOs to develop region-wide plans for transmission enhancements and up-grades and to direct the construction of such facilities necessary for the reliability of the regional system. Order No. 2000 at 31,163. NASUCA had urged in its RTO NOPR comments that the Commission require RTOs to develop baseline regional

transmission expansion plans that would identify the regional grid's ability to satisfy existing NERC reliability criteria. While the Commission did not explicitly adopt this recommendation, the Commission did require RTOs to adopt a planning process which accommodates 'existing institutions and physical characteristics of the region.' *Id.* at 31,164.

At least one example exists of a regional transmission expansion plan which incorporates satisfaction of regional reliability standards: the Pennsylvania-New Jersey-Maryland Interconnection, L.L.C. ('PJM'). PJM is an approved ISO, and filed on October 11, 2000 for approval as an RTO. PJM's filing explains the ISO's compliance with Function 7, i.e. its Regional Transmission Expansion Plan ('RTEP') process. In that process, PJM develops an annual baseline RTEP based on the ability of the existing facilities on the system to satisfies the regional reliability standards developed by the Mid-Atlantic Area Council ('MAAC'). MAAC is the regional reliability council in the PJM territory. Under the existing Operating Agreement which formed PJM as an ISO, and under the proposed Operating Agreement which would transform PJM into an RTO, PJM has the authority as an ISO, and proposes to have the authority as an RTO, to order construction of new transmission or order interconnections for new generation in order to ensure compliance with the regional reliability standards.

The Commission could, as part of regional reliability standards, enhance the regulations under Function 7 of Order No. 2000 to require a similar inter-relationship between RTOs and regional reliability councils throughout the nation. The standards could and should require RTOs to adopt regional reliability council reliability standards, especially those that are consistent with any new federal guidelines resulting from the process being initiated here. Such standards should be incorporated as part of the RTOs' regional transmission planning process and the RTOs should have the ability to order necessary transmission construction and/or generation interconnections to ensure regional compliance with the standards.

The RTO's adoption of such standards should be undertaken via a tariff filing subject to

Commission approval. Any market participant believing that such standards are either insufficient or overly broad or otherwise not in compliance with federal reliability standards could pursue the matter before the Commission either through a complaint proceeding or through comments on the standards at the time the RTO files tariffs incorporating such standards with the Commission for approval.

Additionally, federal reliability guidelines could and should extend to RTOs the ability to develop tariffs requiring compliance with regional reliability standards adopted by the RTO, including penalties for non-compliance. NASUCA had urged a similar construct with respect to the market monitoring function in its RTO NOPR comments. In Order No. 2000, the Commission decided that it would address the issue of penalties for market abuses in rulings establishing RTOs. However, the Commission specifically noted that 'sanctions and penalties may be appropriate for certain actions such as noncompliance with RTO rules.' Order No. 2000 at 31,156. A similar construct should be required to ensure compliance by RTO members with any reliability standards adopted by the RTO as part of its tariff or market rules.

6. Relationship Between Federal And State Regulators

Regarding the jurisdictional divide between FERC and the states, NASUCA submits that reliability concerns must be addressed at both the state and federal level. NASUCA notes that it supported S. 2071's provisions regarding this issue and reserves comment as to further specific recommendations at this time. The existing jurisdictional boundary descends from earlier economic and legal models. However, it is important that this issue be reexamined in light of current events. A reasonable and workable jurisdictional distinction will make participation simpler for all stakeholders. This is critical because, too often, a strict construction of existing jurisdictions creates a gap which neither state nor federal agencies recognize as their responsibility.

A growing number of problems cross any conceivable jurisdictional boundary. It is imperative that effective solutions be explored without regard to jurisdiction. This means that FERC and the states must participate in active, cooperative problem-solving. The Federal-State joint boards sponsored by the Federal Communications Commission are one model which could serve to advance this goal.

7. Application Of Federal Reliability Regulations To International Neighbors

NASUCA will not address this issue.

8. Other Issues: The Role Of Demand Side Resources And Distributed Generation In Federal Reliability Regulations

As noted above, the Commission's regulations under Order No. 2000 require RTOs to ensure a certain degree of both short-term and long-term reliability of the regional transmission grid. These requirements include RTO authority to control the scheduling of transmission outages (Characteristic 4); redispatch transactions so as to manage congestion (Characteristic 4 and Function 2); and develop regional transmission plans, including the authority to order construction of transmission or interconnection of generation for reliability reasons (Function 7). While these regulations encourage RTOs to incorporate demand-side resources and distributed generation into such regional transmission plans, there is no mandate that RTOs must incorporate such resources. In its RTO NOPR comments, NASUCA had encouraged the Commission to require RTOs to incorporate demand side management options and distributed generation resources into regional transmission expansion plans. Such a requirement would provide RTOs an additional tool for ensuring the reliability of the regional electric grids they manage and operate.

NASUCA continues to believe that the Commission should require RTOs to incorporate demand responsive options in its market structure in order to ensure short and long term reliability of the grid. From a competitive market perspective, only by actively developing demand

responsive opportunities will we be able to ensure that market power doesn't exist in wholesale markets. From a reliability perspective, such programs offer opportunities to avoid potential curtailments, load shedding or rolling blackouts.

PJM provides an example of such opportunities. PJM has an active demand side management program for reliability purposes in place through its Active Load Management ('ALM') program. ALM allows utilities and marketers to sign large end-users as interruptible load for a defined number of events during the peak summer season. The existence of ALM contracts allows the utilities or marketers to avoid obtaining capacity to satisfy otherwise applicable installed capacity ('ICAP') obligations equal to the ALM load. In addition, PJM implemented a temporary pilot program during the summer of 2000, the Customer Load Reduction Pilot Program, in an effort to encourage large users to voluntarily curtail load or sell the end-users own generation back to the system during periods of peak demand when reliability concerns existed. *PJM Interconnection, L.L.C.,* Docket No. ER00-3090-000, 92 FERC § 61,059 (2000). While that program expired in September, 2000, PJM's members and stakeholders, through the Distributed Generation User Group, are attempting to develop a permanent program to be in place for the summer of 2001 which would expand the operation of the program beyond reliability concerns so that the program would be operable on an economic basis as well. In other words, the program would come into play when there are peak period reliability concerns or when prices in PJM's energy market reach a contractually pre-determined level.

NASUCA continues to encourage the Commission to require every RTO to develop demand responsive opportunities, including both load reduction programs, sell-back programs and expedited procedures for inter-connecting distributed generation resources. Such programs provide the dual benefit of encouraging the development of workable competition as well as the benefit of enhancing the reliability of the grid during peak demand periods. Such programs could also go a long way toward helping to resolve some of the problems experienced in California during 2000.

9. Summary

NASUCA encourages DOE and the Commission to proceed in the development of federal reliability guidelines or standards. The Commission could ensure compliance with such guidelines or standards by requiring RTOs to incorporate regional reliability standards that are consistent with the federal guidelines both as part of its tariff and as part of its transmission expansion planning process. Such tariffs should incorporate penalties for failure to comply with reliability standards or rules. Recourse to the Commission for final determination as to the propriety of the standards, rule or penalty events would ensure due process for all market participants.

Finally, the Commission should require all RTOs to develop demand responsive programs, including load reduction programs, sell-back programs and distributed generation programs. NASUCA appreciates the opportunity to submit these comments, but encourages all stakeholders to continue to proceed with existing efforts to obtain federal reliability legislation. As noted above, while DOE and the Commission do have some existing authority to require federal reliability standards and regulations, given the controversy surrounding existing federal authority, new federal reliability legislation is critical to both clarify and amplify existing federal authority.

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